Supreme Court, U.S.
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No. 98-1747

IN THE

Supreme Court of the United States

ROSALINDA L. PEREZ, *et al.*,

Petitioners,

v.

PASADENA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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The amicus curiae brief of the United States suggests several reasons for this court to grant certiorari in *Perez v. Pasadena Independent School District*. The suggestions of the Solicitor General are based upon a record that was not fully developed and was considered unreliable by the trial court to permit the Court's meaningful review and resolution of the issues highlighted by the United States.

I.

THE RECORD IN *PEREZ* IS NOT FULLY DEVELOPED ON THE ISSUE THE UNITED STATES ASKS THE COURT TO ADDRESS

The United States urges this Court to set aside and reverse its holding in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and thus eliminate the standards and prerequisites set forth in *Thornburg* and upheld/subscribed to in the various appellate courts that have faced these issues since *Thornburg*. The United States urges this Court to grant certiorari to decide whether a minority plaintiff is barred from establishing a Section 2 vote dilution claim without proof that the minority would constitute the majority of a single-member district, or whether such a plaintiff can pass the first threshold requirement of *Gingles* by pointing to evidence that the minority has been able to elect representatives of its choice in a district with similar demographics even though it does not constitute the majority in that comparison district. The major problem with this theory is that the petitioners in *Perez* did not try their case, or develop a record on this theory. Petitioners argued that they could demonstrate the existence of a majority. Petitioners never offered any evidence that less than a majority could be used to prove a Section 2 vote dilution claim. The United States refers to specific elections in its effort to sway this Court (Brief of the United States at 3). No data or information is known about these elections except that minorities were elected. The United States presents no analysis as to cross-over voting, cohesions of the

minorities or other factors involved in these alleged similar districts that lead to the election of these minorities. The record was not fully developed regarding these elections and therefore, the Court should not place weight or value in these particular elections.

In its footnote number 1, p. 4 of its brief, the United States addresses the fact that neither the trial court nor the Fifth Circuit held that the Petitioners established a violation of Section 2 based upon the Korbel proposed districts. Both the trial courts and the Fifth Circuit addressed the issue of the Korbel proposed district and held they could not meet the burden of *Gingles I*. These proposed districts evidenced a lack of geographic compactness. The trial court did not address *Gingles III* because the burden of meeting *Gingles I* was not met and hence, it was not necessary to analyze any further requirements of *Gingles*.

The Korbel plan was analyzed by the trial court in detail and found to be unreliable. There is no basis to remand for lack of consideration by either the trial court or the Fifth Circuit.

The United States bases its total argument on the testimony of Petitioners' expert witness, George Korbel. The Korbel plan was described by the District Judge as offering projections that resulted in unreliable estimates that offered only a "talismanic measure," of the population. (Pet. brief p. 47) The Korbel plan would have to incorporate magical and miraculous manipulations to meet *Gingles I*. The Court further found the Petitioners' evidence did not provide reliability to overcome the presumption of the census accuracy.

The trial court could not, after carefully considering Petitioners' evidence, find it reliable. This Court should not render a decision based upon this unreliable and unacceptable evidence.

The United States points out that the school district, at the time of trial, had inconvenient polling places, short polling hours and the absence of minority election officials (brief of the United States at 6). Since the trial, these issued have been considered and changed by the PISD Board of Trustees.[1]

II.

THE CVAP DATA RELIED ON BY THE DISTRICT COURT DID PROVIDE THE DISTRICT COURT A FULLY ACCURATE UNDERSTANDING OF WHETHER IT IS POSSIBLE TO DRAW A SINGLE MEMBER DISTRICT TAKING CITIZENSHIP INTO ACCOUNT AND WAS NOT CONTROVERTED IN THIS CASE

Early on in this case, in the absence of actual citizenship data from the census bureau, regression estimates of the sort referred to in the United States brief were utilized by Respondents (United States brief at 9). However, at the trial Respondents produced an analysis of the actual districts proposed by the Petitioners utilizing the census special tabulations of citizenship at the block group level to demonstrate the inability of Petitioners to form a majority in their proposed districts. In addition, when the trial was continued in February of 1997 to consider additional evidence, both Petitioners and Respondents were utilizing the same census data on citizenship (Tr. Ex 75).

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1. It has been pointed out that in Respondent's brief, p. 3, footnote 1, there was a significant increase in polling places (from 4 to 10). The increase in the number of polling places resulted in a significant reduction in Hispanic voter turnout. Quite significantly, this actually resulted in a reduction in Hispanic voter turnout (dropping from 7.4 percent to 6.2 percent). In addition, both the hours of voting and the number of early voting places were expanded. The school district also made extensive efforts to obtain Hispanic election officials, but the Hispanic community showed no interest in participating.

Further, in both the trial court and in Petitioners brief, Petitioners have not made the argument being advanced by the United States that the regression analysis used by the district court may have masked the possibility that citizenship rates for Hispanics are higher among the population located in their two demonstration districts than elsewhere in the PISD, and that Hispanics in these districts would have had the potential to elect a representative of their choice.

The United States addresses the question as to whether, in determining *Gingles I*, the courts should consider voting age population (VAP) or citizen voting age population (CVAP). This case is a voting rights act case. Only citizens can vote and only citizens can bring an action under the voting rights act. Every appellate court that has addressed this issue, has considered only CVAP. The United States has offered no reason, whether legal or otherwise, to support its position of setting VAP as the standard for determining a violation of Section 2. If this Court sets VAP as a standard for determining a violation of the Voting Rights Act, it will have the effect of diluting the "one man, one vote" theory and, as a result, diminish the rights of voting citizens. On its face it appears patently absurd to argue that the courts should utilize VAP and not CVAP to show that the minority could constitute the "majority" of a proposed single member district. The Court should consider only those persons eligible to vote. In addition, in those areas where the issue of citizenship arises, it provides the Court with a clear and concise standard in measuring the true potential of the ability of the minority to elect the candidate of their choice.

The United States, in its argument for the VAP standard, states that "there are some significant practical difficulties with a rule that would require CVAP." The brief does not state what these difficulties may be and where the United States has raised this issue in other cases, they have enumerated difficulties that do not apply to a Section 2 vote dilution claim.

If there are any practical difficulties, these can be easily remedied by making available the citizenship census data at the same time the remainder of the census data is made available (Respondent's brief at p. 9).

CONCLUSION

The brief filed by the United States does not contain one citation from any case, statute, constitutional provision or any other legal authority to support its position. The United States is making a political rather than legal argument. In its brief, the United States has taken the position that the absolute 50% rule applied by the court of appeals in this case and in Valdespino is erroneous (United States brief at 8). The United States has not attempted to explain or cite any authority as to how or in what manner the 50% rule applied by the court of appeals in this case is erroneous. In effect, the United States is basing its argument on what appears to be administrative policy and not legal argument. In its brief, the United States has failed to address the importance of the citizenship issues raised by Respondents and how this issue impacts on the ability of the Hispanic citizens to elect the candidates of their choice. Should this Court elect to reverse its holding in *Gingles* and allow less than a majority of minority voters to prove a Section 2 vote dilution claim, it will have the effect of creating the illusion of a remedy and will further impede the ability of the Hispanic citizens to elect the candidate of their choice. To allow less than a majority of minority voters to prove a Section 2 vote dilution claim will also eliminate the standard for harm. The *Gingles I* threshold addresses both the potential to elect and whether the challenged election system has damaged the plaintiffs in a voting rights case. Absent an actual majority of CVAP, plaintiffs in a Section 2 vote dilution claim cannot demonstrate that they have in fact been harmed by the challenged election system.

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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